



# *COMMONWEALTH of VIRGINIA*

## *DEPARTMENT OF ENVIRONMENTAL QUALITY* VALLEY REGIONAL OFFICE

Matthew J. Strickler  
Secretary of Natural Resources

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David K. Paylor  
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Regional Director

### **STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO BROOKFIELD STEPHENSON VILLAGE, LLC FOR STEPHENSON VILLAGE PLANNED RESIDENTIAL COMMUNITY Permit No. 05-1518**

#### **SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Brookfield Stephenson Village, LLC regarding the Stephenson Village Planned Residential Community, for the purpose of resolving certain violations of State Water Control Law, Regulations, and the Permit.

#### **SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. "Brookfield" means Brookfield Stephenson Village, LLC, a limited liability company authorized to do business in Virginia and its members, affiliates, partners, and subsidiaries. Brookfield is a "person" within the meaning of Va. Code § 62.1-44.3.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
5. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.
6. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.
7. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
8. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
9. "Permit" or "Virginia Water Protection Permit" means the individual permit number 05-1518, issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5, and serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344), to Brookfield on January 5, 2007. A Major Modification to this Permit was approved on November 18, 2008, and a Minor Modification was approved on November 15, 2018.
10. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
11. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.
12. "Property" or "Parcel" means the tract of land at Snowden Bridge Blvd, located in Stephenson, Virginia, owned by Brookfield, and referred to as Stephenson Village Planned Residential Community.

13. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
14. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.
15. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
16. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
17. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
18. "USACE" means the United States Army Corps of Engineers.
19. "Va. Code" means the Code of Virginia (1950), as amended.
20. "VAC" means the Virginia Administrative Code.
21. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

#### **SECTION C: Findings of Fact and Conclusions of Law**

1. Brookfield owns and is developing the Property, which consists of 795 acres, to be used for the development of a planned residential community
2. DEQ issued the Permit to Brookfield on January 5, 2007. A Major Modification was approved on November 18, 2008, and a Minor Modification was approved on November 15, 2018, for designated impacts to streams and wetlands at the Property
3. On May 17, 2017 and August 30, 2017, DEQ staff performed inspections of the Property. DEQ staff observed:
  - a. Approximately 111 linear feet of unauthorized stream channel impacts associated with stream crossings (culverts) and fill material. These impacts were observed

below Impact Areas 17 (approximately 30 linear feet of unauthorized stream channel impacts), below the outlet protection at Impact Area 17 (approximately 15 linear feet of unauthorized stream channel impacts), and Impact Area 19 (approximately 66 linear feet of unauthorized stream channel impacts). The observed impacts were outside of the approved Permit impact areas. A report received on June 21, 2017 from Virginia Waters and Wetlands (project agent) identified the additional unauthorized impacts noted above;

- b. The downstream culvert at Impact Area 17 was not countersunk a minimum of six inches;
  - c. DEQ does not have record of the submission of proof of the recordation of the protective instrument for on-site compensatory mitigation areas identified as Mitigation Areas D, P, S, T, U, V, and W; and
  - d. Flagging or marking around nonimpacted surface waters was not observed at the Property.
4. 9 VAC 25-210-50.A states that: "Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall ... fill or discharge any pollutant into, or adjacent to surface waters, ... otherwise alter the physical, chemical or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses...."
  5. Va. Code § 62.1-44.15:20.A states that: "Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to: ... conduct the following in a wetland: New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; Filling or dumping; ... or New activities that cause significant alteration or degradation of existing wetland acreage or functions; or Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board."
  6. Permit Part I.C.2 states that: "No activity shall substantially disrupt the movement of aquatic life indigenous to the water body, including those species that normally migrate through the area, unless the primary purpose of the activity is to impound water."
  7. Permit Part I.C.3 states that: "At crossings of streams, pipes and culverts less than 24 inches in diameter shall be countersunk a minimum of three inches, and pipes and culverts greater than 24 inches in diameter shall be countersunk a minimum of six inches to provide for the re-establishment of a natural stream bottom and to maintain a low flow channel..."
  8. Permit Part I.J.4.n.(3) states that: "The protective instrument shall be recorded in the chain-of-title to the property on which the compensation site exists. Proof of recordation shall be submitted to DEQ within 60 calendar days following DEQ's review

and confirmation of the surveyed or platted compensation site.”

9. Permit Part I.C.25 states: “All non-impacted wetlands, streams, and designated upland buffers that are within the project or right-of-way limits, and that are within fifty feet of any project activities, shall be clearly flagged or demarcated for the life of the construction activity within that area. All non-impacted open water areas within the project of right-of-way limits, and that are within fifty feet of any project activities, shall be clearly flagged or demarcated, as practicable, for the life of the construction activity within that area. The permittee shall notify all contractors and subcontractors that no activities are to occur in these marked areas.”
10. On September 26, 2017, DEQ issued NOV No. 1709-000514 to Brookfield for violations of State Water Control Law, Regulations, and the Permit.
11. On November 8, 2017, DEQ staff met with Brookfield representatives and their consultant to discuss the NOV. As a result of the meeting, DEQ sent a request for additional information for purposes of the Permit, on December 14, 2017.
12. On January 10, 2018, On January 10, 2018, Brookfield submitted a written response to the NOV, detailing actions taken towards compliance, as well as future plans for a Modification to the Permit. Brookfield stated in the letter that, since the issuance of the NOV, Brookfield flagged the required avoided areas, the culvert at Impact Area 17 had been properly countersunk, and the deed recordation would be filed upon modification to the Permit.
13. Throughout 2018, DEQ worked with Brookfield in order to modify their Permit. On November 15, 2018, DEQ approved the Minor Modification to the Permit, to allow an increase of temporary impacts associated with a sewer line along Hiatt Run and Hiatt Run, UT.
14. Based on the results of the May 17, 2017 and August 30, 2017 inspections, the November 8, 2017 meeting, and the documentation submitted on January 10, 2018, the Board concludes that Brookfield has violated the State Water Control Law, Regulations, and the Permit, as described in C(3) – C(9) above.
15. Brookfield has submitted documentation that verifies that the violations described in partially in paragraph C(3), and in paragraphs C(7), ) above, have been corrected.
16. In order for Brookfield to complete its return to compliance, DEQ staff and representatives of Brookfield have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

**SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Brookfield, and Brookfield agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$19,500 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

Brookfield shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Brookfield shall be liable for attorneys' fees of 30% of the amount outstanding.

**SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of Brookfield for good cause shown by Brookfield, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in NOV No. 1709-000514, dated September 26, 2017. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Brookfield admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Brookfield consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. Brookfield declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by Brookfield to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Brookfield shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Brookfield shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Brookfield shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;
  - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
  - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and Brookfield. Nevertheless, Brookfield agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
  - a. the Director or his designee terminates the Order after Brookfield has completed all of the requirements of the Order;
  - b. Brookfield petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
  - c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Brookfield.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Brookfield from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by Brookfield and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. The undersigned representative of Brookfield certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Brookfield to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Brookfield.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, Brookfield voluntarily agrees to the issuance of this Order.

And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

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Amy T. Owens, Regional Director  
Department of Environmental Quality



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Consent Order  
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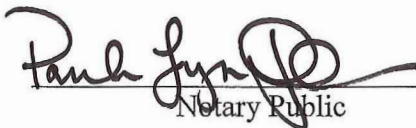
Brookfield Stephenson Village, LLC voluntarily agrees to the issuance of this Order.

Date: 12/20/2018 By: , Vice President Land Development  
Neil Patel Title

Brookfield Stephenson Village, LLC

Commonwealth of Virginia  
City/County of Fairfax

The foregoing document was signed and acknowledged before me this 20th day of  
December, 2018, by Neil Patel who is  
Vice President Land Development of Brookfield Stephenson Village, LLC, on behalf of the  
company.

  
Notary Public

7391295

Registration No.

My commission expires: Sept. 30, 2019

Notary seal:

Paula Lynn Johnson  
NOTARY PUBLIC  
Commonwealth of Virginia  
Reg. # 7391295  
My Commission Expires Sept. 30, 2019

## APPENDIX A SCHEDULE OF COMPLIANCE

1. Brookfield shall immediately cease unauthorized impacts to state waters and shall not resume such impacts unless authorization from DEQ is granted via a Permit.
2. By March 31, 2019, Brookfield shall have the protective mechanism for compensation sites recorded and submit proof to DEQ.
  - a. The proposed deed restriction language for protecting the compensation site, including all surface waters and upland areas that are to be preserved in perpetuity within the compensation site boundary. Protection of the compensation site shall be documented as follows:
    - i. The protected areas shall be surveyed or platted within 120 calendar days of final compensation plan approval by DEQ. The final survey or plat shall be certified by a professional engineer or licensed land surveyor and shall be submitted to DEQ for review and approval.
    - ii. The protective instrument shall be submitted to DEQ for review and approval prior to recordation. Additionally, the protective instrument shall be written so that no activity will be performed on the property in any area designated as a compensation site or non-impacted surface water, with the exception of maintenance or corrective action measures authorized by DEQ.
    - iii. The protective instrument shall be recorded in the chain-of-title to the property on which the compensation site exists.
3. No later than April 15, 2019, Brookfield shall submit proof of purchase of 107 stream compensation credits from a DEQ-approved mitigation bank that is authorized and approved by DEQ to sell credits in the area in which the impacts occurred and has credits available (as released by DEQ) to achieve no-net-loss of existing wetland acreage and no-net-loss of function in all surface waters in accordance with 9 VAC 25-210-116. Should mitigation bank credits be unavailable, Brookfield shall purchase in-lieu fee program credits.
4. Unless otherwise specified in this Order, Brookfield shall submit all requirements of Appendix A of this Order to:

Tiffany R. Severs  
Enforcement Team Leader  
VA DEQ –Valley Regional Office  
4411 Early Road, Mailing PO Box 3000

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